No. 15172

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

W. B. JONES LUMBER COMPANY, INC., AND LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2288, AFL, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition (R. 77)[1] of the National Labor Relations Board pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*)[2] for enforcement of its order issued against respondent Lumber and Sawmill Workers' Union, Local 2288, on October 14, 1955, following the usual proceedings under Sec-

[1] References to portions of the printed record are designated "R." References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

[2] Relevant portions of the Act appear in Appendix B, pp. 20–24, *infra.*

tion 10 of the Act.[3] The Board's decision and order (R. 67) are reported in 114 N. L. R. B. 415. This Court has jurisdiction of the proceeding under Section 10 (e) of the Act, the unfair labor practice (the discharge of an employee for non-membership in a union) having occurred in Los Angeles, California, within this judicial circuit.

STATEMENT OF THE CASE

I. The Board's findings of fact and conclusions of law

A. The Board's findings and conclusions concerning the business of the Company

W. B. Jones Lumber Company, Inc. (hereafter called the Company), a California corporation, operates a lumber yard in Los Angeles, California, where it is engaged in the business of selling lumber at wholesale and retail (R. 12; 96). In 1954, the Company sold and shipped products valued at $34,260.71 from California to customers located in the State of Nevada (R. 13; 153, 163). During the same year, the Company also sold and delivered products valued at more than $200,000 to a number of customers in California, each of which sold and shipped goods valued in excess of $50,000 from points within the State of California to places in other states (R. 13–17; 101–107, 154–165, 165–176, 177–187, 190–191, 191–193, 200–206, 208–209, 211–212, 212–215, 217, 222, 4, 6–9).

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[3] The Board's order is also directed to W. B. Jones Lumber Company. The Board herewith withdraws its request for enforcement of the Order against the Company which has indicated its readiness to comply with the Order.

Upon these facts, the Board found that the Company's operations affect commerce within the meaning of the Act, that they satisfy the Board's jurisdictional standards set forth in *Jonesboro Grain Drying Cooperative,* 110 N. L. R. B. 481,[4] and hence that the assertion of jurisdiction will effectuate the policies of the Act (R. 68, n. 1, 17).

B. The Board's findings and conclusions concerning respondents' unfair labor practices

Don F. Tooze, the discharged employee involved in the proceeding, was hired by the Company on October 28, 1954 (R. 19; 120). On November 3, John Matzko, a representative of respondent Union (R. 19; 149), having learned of Tooze's employment,[5] approached Tooze and introduced himself as the Union's representative (R. 20; 121–122). Tooze immediately informed Matzko that before he left his former job a union which he had joined had found him guilty of engaging in dual unionism. Matzko thereupon advised Tooze that he intended to verify Tooze's story and that if true, "he would have to pull [Tooze] off the job" (R. 20; 123). Later that day, Tooze went to the Union's offices and, after repeating the events

[4] These standards are discussed in the Argument, at pp. 6–7, *infra.*

[5] Company President William Jones testified that the Company has dealt with the Union in the sense that it has been satisfied to "go along" with the provisions of the contract negotiated between the Union and five lumber yards known as the "big five" (R. 18; 97), and that Union Representative Matzko has customarily visited the Company yard once a week to discuss new employees and those who had failed to pay union dues (R. 19–20; 115–117).

relating to his former union membership, was told by the Union's senior business agent, Knight, to return the following Friday to obtain a work permit for November (R. 20; 124–126). When Tooze, accompanied by Employee Robert Oyster, returned several days later, Knight refused to issue a work permit to him because he was "not a member in good standing" (R. 20–21; 126–127). Knight also showed Tooze several letters, received from officials of his former union, advising that Tooze had been placed on probation because of dual unionism, that Tooze was "a perpetual trouble maker," and that he was in arrears in his union dues (R. 21; 127–128).[6] Tooze thereupon offered to pay his arrears to Knight and to rejoin the union, but Knight rejected the offer (R. 21–22; 128, 145–148). Unlike Tooze, Oyster was given a work permit (*ibid.*).

On November 17, 1954, Matzko advised Tooze that he was "going to have to pull [him] off the job" (R. 22; 129–132). Matzko then informed Yard Superintendent Alexander Hardy that "Tooze was not a member of [Local] 2288" and that he would have to "pull [him] off the job" (R. 22; 119–120, 132–133). When Matzko added that the Union would "put a picket line around the yard" if Tooze were not discharged, Hardy reluctantly agreed to let Tooze go

[6] One letter was from Local 2453, United Brotherhood of Carpenters and Joiners of America, to which Tooze had belonged (R. 220); the other two were from the Willamette Valley District Council of the Lumber and Sawmill Workers, chartered by the above-mentioned Carpenters Union (R. 218, 220).

(R. 22; 111–114; 134–135). On the following day, Tooze reported for work, but Hardy refused to accept his services without "anything in writing from the union or the National Labor Relations Board" (R. 23; 136). When Tooze subsequently returned for his check, Company President Jones expressed the opinion that Tooze was "a good worker," and urged him to pay whatever dues he owed and to "square" himself with the Union (R. 23; 136–137, 150–152). Tooze agreed to follow Jones' suggestion and immediately proceeded to the Union's offices. He there offered to pay "back dues" and to pay initiation fees and dues in order to join the Union; but Business Agent Knight replied that the Union could not accept dues owed to "another union," and rejected the offer to join respondent Union (R. 24–25; 138–140).

On the basis of these undisputed facts, the Board unanimously found that the Union denied membership to Tooze, refused to issue a work permit to him, and caused the Company to discharge him. The Board further found that the Company discharged Tooze because he was not a member of the Union. Accordingly, the Board concluded that since the Company and the Union had not executed a valid union-security agreement requiring union membership as a condition of employment, the Union's conduct violated Sections 8 (b) (1) (A) and 8 (b) (2), and the Company's conduct violated Section 8 (a) (1) and (3) of the Act (R. 68, 25–32).

II. The Board's order

The Board's order (R. 69–73) requires the Union and the Company to cease and desist from the unfair labor practices found, and from any other unlawful infringement on the statutory rights of the Company's employees. Affirmatively, the order requires the Union to request the Company to reinstate Tooze, requires the Company to reinstate Tooze, and requires the respondents jointly and severally to make Tooze whole for any loss of pay he may have suffered by reason of the discrimination against him. Finally, the order requires the posting of appropriate notices.

ARGUMENT

I. The Board properly asserted jurisdiction over the Company

The evidence (*supra,* p. 2) establishes that in 1954, the Company shipped over $30,000 worth of material from California to Nevada. This, without more, would establish that its operations are subject to the National Labor Relations Act. *N. L. R. B.* v. *Stoller,* 207 F. 2d 305, 307 (C. A. 9), certiorari denied, 347 U. S. 919. Before the Board, the Company did not question the Board's jurisdiction. The respondent Union, however, contended that the Board should not assert the jurisdiction which it possesses, because under the Board's self-limiting jurisdictional standards the Company's business did not have sufficient impact upon commerce to warrant the Board's exercise of its powers. Assuming, *arguendo,* that this issue

is reviewable before the courts,[7] we submit that the evidence establishes that the Company's operations satisfied the Board's jurisdictional standard.

In *Jonesboro Grain Drying Cooperative,* 110 N. L. R. B. 481, 484, the Board announced that it would assert jurisdiction over an enterprise which annually furnishes goods valued at $200,000 or more to concerns which in turn annually ship goods valued in excess of $50,000 to places outside the state. The Board found (R. 68, n. 1, 12–17), and the evidence shows (*supra,* p. 2), that the Company here met this jurisdictional standard. The Union, however, challenged the competency of the evidence showing the interstate sales made in 1954 by several of the Company's customers, asserting that the Company's business with the remaining customers did not meet the $200,000 minimum standard referred to above. The Union's challenge was based upon two contentions, both of which are without merit.

1. Relying upon this Court's decision in *N. L. R. B.* v. *Haddock-Engineers Ltd.,* 215 F. 2d 734, the Union contended that such evidence was hearsay because adduced by witnesses who testified from summaries of

[7] But see this Court's observation in *Stoller*, *supra*, 207 F. 2d at 307, that "where the Board has jurisdiction, * * * whether such jurisdiction should be exercised is for the Board, not the courts, to determine." See also *Local Union No. 12* v. *N. L. R. B.*, 189 F. 2d 1, 5 (C. A. 7), certiorari denied, 342 U. S. 868, where the Board dismissed a complaint issued pursuant to a union's charge, holding that the amount of commerce affected failed to meet the Board's jurisdictional standards, and the court of appeals, sustaining the Board, held that the union "has no legally cognizable right in any particular Board jurisdictional policy."

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sales records or sales tax returns which they had not personally prepared, and because they either failed to produce such customers' original books at the hearing or to release into the Union's custody those books which were produced. The record shows, however, that the challenged evidence was adduced by responsible employees of the Company's customers, and that they testified, both on direct and cross examination, either from personal knowledge or from sales summaries or tax returns which they personally prepared or which were prepared under their supervision (R. 101–102, 165–169, 171–172, 177–186, 191–192, 194–196, 200–206). The record further shows that the Union was expressly advised at the hearing that such books and records would be available, and the Trial Examiner admitted the challenged evidence into the record subject to a motion to strike if the Union was not "given suitable access to the records for inspection," or if it could show that the evidence was inaccurate (R. 196, 205, 215, Appendix A at pp. 15–19, *infra*).[8] No claim has been made by the Union, however, that it requested, but was refused, an opportunity to examine such customers' original books and records in order to verify the testimony given, and the Union has failed to produce any evidence showing that the testimony of the witnesses did not accurately reflect the books. We submit that such competent testimony differed substantially from the hearsay memoranda, unsupported by the testimony of witnesses subject to

[8]Appendix A contains testimony inadvertently omitted from the printed record.

cross examination, rejected in the *Haddock* case, and "could properly be considered by the Board in determining whether this was such a case as would warrant its taking jurisdiction, and in no sense could it, in this respect, be bound by the hearsay evidence rule." *N. L. R. B.* v. *J. R. Cantrall Co.,* 201 F. 2d 853, 855 (C. A. 9), certiorari denied, 345 U. S. 996; see also *Stephens* v. *United States,* 41 F. 2d 440, 444 (C. A. 9); *Pallma* v. *Fox,* 182 F. 2d 895, 901–902 (C. A. 2); *Connecticut Importing Co.* v. *Frankfort Distilleries,* 101 F. 2d 79, 81 (C. A. 2); *United States* v. *Mortimer,* 118 F. 2d 266, 269 (C. A. 2).

2. The Union further contended that the procedure followed in establishing the interstate sales of one of the Company's customers, Mississippi Glass Co., resulted in a denial of due process, and that without such sales, the jurisdictional standards are not satisfied. The facts are that one Smith, the office manager of Mississippi Glass, testified that he had prepared a summary of his employer's interstate sales (R. 194–196, 198). When counsel for the General Counsel sought to introduce the summary, which shows the 1954 interstate sales as $324,015.68 (R. 222), the summary was excluded by the Trial Examiner because Smith's "evidence is in as to the amount" (R. 197). After the close of the hearing, the Trial Examiner discovered that whereas his notes showed the interstate sales of Mississippi Glass to be the above-mentioned amount, the stenographic transcript of Smith's testi-

mony gave the amount as $32,415.68.[9] Concluding that the latter figure was erroneous, the Trial Examiner on July 5, 1955, issued and served upon the parties an Order To Show Cause, returnable in person or through affidavits, why the erroneous figure in the transcript should not be corrected (R. 3). In response, counsel for the General Counsel submitted an affidavit by Smith stating that he had "testified to the amount which appeared on the summary which [he] consulted at that time," and that $324,015.68 represented "the correct amount" of Mississippi Glass' interstate sales "as evidenced by the invoices summarized in the document" (R. 6–9). The Company made no return to the Order, and the Union's response consisted only of a letter challenging the Trial Examiner's "authority to take any action in the correction of the transcript" in the "absence of any motion of any of the parties or a stipulation of the parties for the purpose of correcting the transcript" (R. 5–6). In his Intermediate Report, the Trial Examiner found that "the transcript inaccurately quotes Smith" and accordingly corrected the record so as to show Mississippi Glass' interstate sales as $324,015.68 (R. 13, n. 1).[10] The Board affirmed this finding (R. 68).

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[9] This amount appears at page 293 of the original stenographic transcript filed with the Clerk of this Court as part of the certified record. The printed record (R. 196) inadvertently shows the correct amount rather than the erroneous amount which actually appeared in the transcript.

[10] The Examiner modified his ruling rejecting Smith's summary, referred to above, and received it "for the single purpose of serving as an explanatory supplement to Smith's affidavit" (R. 15, n. 1).

A mere recitation of these facts, we submit, shows that the procedure followed in correcting an obvious error in the stenographic transcript was proper and fair. The Trial Examiner's action was well within the authority vested in him by the Administrative Procedure Act and the Board's Rules and Regulations.[11] As the court pointed out in *N. L. R. B.* v. *Bryan Mfg. Co.,* 196 F. 2d 477, 478 (C. A. 7), one of the Trial Examiner's "functions is to see that the facts are clearly and fully developed." And although it does not appear that a copy of Smith's affidavit was served upon the Union, the latter was apprised of its existence in the Intermediate Report (R. 14, n. 1). At no time, however, did the Union thereafter challenge the accuracy of the affidavit, or submit evidence contradicting the Trial Examiner's finding, adopted by the Board, respecting the interstate sales of Mississippi Glass, or even request an opportunity to examine Smith concerning his affidavit. Accordingly, it is difficult to see "how, if at all, the [Union] was prejudiced" by the correction of the record. *N. L. R. B.* v. *Eclipse Lumber Co., Inc.,* 199 F. 2d 684, 686 (C. A. 9). In such circumstances, the most that can be said for the Union is that the failure to serve it with a copy of Smith's affidavit resulted in

[11] Section 7 (b) of the APA (60 Stat. 241, 5 U. S. C. Sec. 1006 (b)) empowers the Trial Examiner to "(5) regulate the course of the hearing * * * and (9) take any other action authorized by agency rule consistent with this Act." Section 102.35 of the Board's Rules (29 C. F. R. 102.35) empowers the Trial Examiner "(f) to regulate the course of the hearing * * * [and] (j) * * * to introduce into the record documentary or other evidence."

harmless error. Rule 61, Rules of Civil Procedure for the District Courts; *Olin Industries, Inc.* v. *N. L. R. B.,* 192 F. 2d 799 (C. A. 5), certiorari denied, 343 U. S. 919; *N. L. R. B.* v. *Ed Friedrich, Inc.,* 116 F. 2d 888, 889 (C. A. 5); *Union Starch & Refining Co.* v. *N. L. R. B.,* 186 F. 2d 1008, 1013 (C. A. 7), certiorari denied, 342 U. S. 815; *N. L. R. B.* v. *Air Associates,* 121 F. 2d 586, 589 (C. A. 2).

II. Substantial evidence supports the Board's finding that the Company violated Section 8 (a) (3) and (1) by discriminating against Tooze, and that the Union violated Section 8 (b) (2) and (1) (A) of the Act by causing the Company to do so

The law is well-settled that where a union which does not have a valid union-security agreement causes an employer to discharge an employee for want of union membership, the employer violates Section 8 (a) (3) and (1) and the union violates Section 8 (b) (2) and (1) (A) of the Act. *Radio Officers Union* v. *N. L. R. B.,* 347 U. S. 17, 40–41; *N. L. R. B.* v. *Thomas Drayage & Rigging Co.,* 206 F. 2d 857, 859 (C. A. 9); *N. L. R. B.* v. *J. R. Cantrall Co.,* 201 F. 2d 853, 855–856 (C. A. 9), certiorari denied, 345 U. S. 996. In the instant case, uncontroverted evidence establishes that three weeks after the Company hired Tooze the Union demanded his discharge for non-membership, and the Company acceded to the demand. It follows that by this conduct the Company and the Union violated the sections of the Act referred to above.

While the record in this case contains no suggestion that the respondents had a union-security agreement, it should be noted that even if the Union's demand for Tooze's discharge had been made pursuant to a valid union-security agreement, it would have been unlawful since the demand occurred prior to the expiration of thirty days after Tooze was hired (*supra,* pp. 3–5). Moreover, the demand was unlawful in view of the Union's refusal to accept Tooze's offer to pay the required initiation fee and dues in order to become a member (*supra,* p. 5). Such refusal constituted a denial of membership "on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership," as provided in Section 8 (b) (2). *N. L. R. B.* v. *International Association of Machinists, Local 504,* 203 F. 2d 173, 175–176 (C. A. 9).

Although the Union filed voluminous exceptions to the Trial Examiner's Intermediate Report, its brief in support of exceptions sought to defend its conduct solely upon the grounds that Tooze was not a member in good standing of another union, and that there was no evidence that Matzko, who had demanded Tooze's discharge on November 17, 1954, "had any connection with respondent union." But Tooze's standing in another union is irrelevant, and the Union stipulated at the hearing "that Matzko was a [Local 2288] union representative and, to-wit, an assistant business agent during the month of November 1954" (R. 149).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Board properly asserted jurisdiction over the Company's operations, that the Board's findings are supported by substantial evidence, that the order is valid and proper in all respects, and that a decree should issue enforcing the Board's order in full.

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DECEMBER 1956.

Appendix

Excerpts From Stenographic Transcript of Testimony Before Trial Examiner

SEE PAGE 8, NOTE 8

[35] Willis H. Merrill, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

* * * * *

[45] CROSS-EXAMINATION

* * * * *

[48] Trial Examiner. With respect to those figures you have given, I'm referring to the 70 percent figure and the names of the consignees that you have mentioned, does your company keep records reflecting the names?

The Witness. Yes, we do.

Trial Examiner. And the shipments to them?

The Witness. Yes, we do.

Trial Examiner. Where are those records available?

The Witness. At our offices, 1144 West 135th Street.

Trial Examiner. Are they in your custody?

The Witness. Yes, they are.

Trial Examiner. Have you any objection to showing those records either to counsel here?

[49] The Witness. No, not at all, your Honor.

* * * * *

[51] TRIAL EXAMINER. All right. I take it if Mr. Nicoson requested access to the records at your plant you would be glad to show them to him?

The WITNESS. Absolutely.

TRIAL EXAMINER. Are you in a hurry to get back to your place of business right now?

The WITNESS. I have been away from there since 9:00 o'clock this morning.

TRIAL EXAMINER. You would like to get back?

The WITNESS. I would like to but I'm willing to cooperate in any way I can while I'm still here.

TRIAL EXAMINER. I think perhaps this would be better and would save time, from your knowledge of the records that you have here with you, do you think that you could show them to Mr. Nicoson in say a period of ten minutes?

The WITNESS. I don't think I could verify any of those figures in a period of ten minutes; no. It takes a lot of recap work and recap sheets to support it which unfortunately are in my office.

TRIAL EXAMINER. Well, this is what I'm going to do, gentlemen. I think I have come to some kind of conclusion here as to the means of expediting this hearing and still do justice to all concerned. I have in mind the provisions of the Act which require me to follow the rules of evidence applicable to the United States District Courts if practicable.

[52] This witness assured me under oath, Mr. Nicoson, that you may have access to the original records and inspect them at his plant. From what has gone on before, it seems likely we won't conclude this proceeding until quite some time. The witness has stated under oath that it would be inconvenient for him to leave the records here and to spend considerable amount of time here but he is willing to cooperate. I am going to receive the document. I will receive

it subject to any proper motion to strike the document from the record upon a showing to me that the information in the document is inaccurate or should otherwise be excluded or that you have not been given suitable access to the records for inspection. The objection will be overruled.

* * * * *

[235] GEORGE CROSSMOND FEE, a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

* * * * *

[249] CROSS-EXAMINATION

* * * * *

[253] TRIAL EXAMINER. Mr. Garrett, now that you have had an opportunity to look through these exhibits for identification, I am certainly willing to adhere to my previous condition, if you wish, that is.

Do you want the contents kept here for an additional period?

Mr. GARRETT. Yes, because there are other attorneys involved who may wish to look at them and I can tell them what [254] is in them briefly.

I don't think any harm would be done if they wait here or were held here, for a couple of days. I have looked at them, but Mr. Garrett or Mr. Nicoson may wish to look at them.

TRIAL EXAMINER. Are there any more questions of this witness?

Mr. Weil?

Mr. WEIL. I have nothing else.

TRIAL EXAMINER. We will go off the record for a moment now.

(Discussion off the record.)

TRIAL EXAMINER. On the record.

Mr. Garrett, there is no objection to Mr. Weil having these documents in his custody?

Mr. GARRETT. No.

TRIAL EXAMINER. It will be my condition that Mr. Weil will make these available to the respondents, should they request them. These records will be regarded as records kept in the usual course of business upon identification being made, even although the custodian did not testify or the person who made the entries did not testify. They will be permissible as records kept in the usual course of business, under the Act.

[255] I have taken the position that it would be impracticable to introduce the records themselves in evidence, if considered part of an entire picture, taking into account the other records in this proceeding that have been admitted or would be admitted if we required each and every record to which reference has been made here.

I have laid down the condition that the records General Counsel's Exhibits Nos. 26 through 30 marked for identification will remain here for the perusal of respondents until the close of business here on Friday, and they will be in your custody, Mr. Weil.

TRIAL EXAMINER. All right, that is all.

* * * * *

[290] RICHARD SMITH, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

* * * * *

[294] CROSS-EXAMINATION

* * * * *

[299] TRIAL EXAMINER. These invoices you testified to, were [300] posted to a certain book?

The WITNESS. Yes.

TRIAL EXAMINER. Would there be any objection to any counsel connected with this hearing, having reference to that book?

The WITNESS. No; there would not.

TRIAL EXAMINER. All right, that is all. Thank you.

* * * * *

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 *et seq.*), are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the

right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an

agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7;

* * * * *

(2) To cause or attempt to cause an employee to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon

the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1988